Appeal No. 2004AP2322 **Cir. Ct. No. 2003CV907**

WISCONSIN COURT OF APPEALS
DISTRICT II

MARK SONDAY AND JOYCE SONDAY,

PLAINTIFFS-APPELLANTS,

V.

DAVE KOHEL AGENCY, INC.,

DEFENDANT-RESPONDENT.

FILED

Aug 31, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Is a real estate broker entitled to a broker's commission under a listing contract when the listed real estate is condemned and acquired by a governmental agency during the listing?

2. If the real estate listing contract permits recovery of a broker's commission in a condemnation, does public policy preclude such payment?

BACKGROUND

The parties submitted a stipulation of facts in anticipation of the circuit court's ruling on their respective summary judgment motions. The stipulation and associated exhibits provide the foundation for the following recitation of the facts.

Mark and Joyce Sonday (Sonday) listed two parcels of commercial real estate for sale with the Dave Kohel Agency, Inc. (Kohel) on May 15, 2002.[1] The two-acre "van parcel" was listed at $800,000 and the fifteen-acre "military parcel" at $2,250,000.[2] If sold at the listed prices, the total broker's commission for Kohel would be $183,000.

The standard WB-5 commercial listing contracts were for a one-year period expiring on May 15, 2003, each with a six percent commission clause providing in part:

> ***COMMISSION:*** Seller shall pay Broker's commission, which shall be earned if, during the term of this Listing:
>
> ….
>
> 4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property[.]

Kohel met with the administrator of the Village of Pleasant Prairie on or about May 28, 2002, and suggested that the Village purchase the Sonday

[1] The parcels had been listed previously with Kohel, no offers to purchase had been received, and those listing contracts lapsed in 2000.

[2] The smaller parcel is the site of Sonday's business of repairing, restoring, and customizing vehicles; the larger parcel is the site of the Kenosha Military Museum.

properties for approximately $2,000,000, which was $1,050,000 less than the listing contract price.[3] The administrator rebuffed Kohel's suggestion.

On June 17, 2002, the Village created the Community Development Authority (CDA) to develop the area along the I-94 corridor, which included the Sonday van and military parcels. On July 3, 2002, Sonday instructed Kohel not to contact the Village concerning the parcels; however, Sonday indicated that the listing contracts would be honored if Kohel produced a buyer, other than the Village, who was willing to pay the listing price. On August 2, 2002, Kohel responded, noting that the Village had not been listed as an excluded party on line forty-four of the contracts; however, Kohel agreed not to negotiate with the Village on Sonday's behalf.

On February 12, 2003, the CDA adopted a redevelopment plan that included the Sonday parcels. On May 9, 2003, Kohel served notice to Sonday that it was extending its listing contracts through May 15, 2004, and named the Village as a protected buyer.

The CDA, through its relocation agent HNTB corporation, attempted to negotiate with Sonday regarding the terms and conditions of the acquisition of Sonday's two parcels, but the negotiations were unsuccessful. On February 19,

[3] Assuming, for purposes here, that the Village was a protected buyer under the extended listing contract and Sonday accepted this substantially reduced price, Kohel would have received a commission of $120,000. However, the circuit court awarded Kohel a commission based upon the full listing contract price, or $183,000. As a result, Kohel received $63,000 more than would have been earned had the sales price suggested to the Village prevailed. Sonday appeals from the circuit court's award of a six percent commission on the full listing price, contending that if any commission is due it should be calculated from the actual jurisdictional offer under the condemnation proceeding. We conclude that this issue, while related, is not a basis for certification.

2004, the CDA made jurisdictional offers for both parcels in the total amount of $1,382,000. On March 2, 2004, Kohel recorded amended broker lien notices with the Kenosha County Register of Deeds for unpaid commissions earned under the May 15, 2002 listing contract.

The CDA, again through HNTB, deposited the total jurisdictional offer amount, less real estate taxes and interest, with the Kenosha County Clerk of Circuit Court, pending the resolution of disputed claims to the money. The circuit court ordered that $228,750 be held by the clerk, and the balance was disbursed to Sonday.

Sonday brought an action to void Kohel's commission claim and Kohel counterclaimed for full commission on the listing contracts. Upon the parties' motions for summary judgment, affidavits and the stipulated facts, the circuit court dismissed Sonday's action and granted summary judgment to Kohel. It ordered Sonday to pay Kohel a commission of six percent on the full listing price in the contracts ($183,000), plus attorney fees.

DISCUSSION

WB-5 Commercial Listing Contract Interpretation

The primary issue is whether Kohel is entitled to a broker's commission from the CDA's acquisition of Sonday's property based upon language in the new standard WB-5 commercial listing contract. The new version became mandatory on September 1, 2000. The key phrase directs the seller to pay the broker a commission if, during the term of the listing, "[a] transaction occurs which causes an effective change in ownership or control of all or any part of the Property." No Wisconsin authority exists on whether a transaction, for purposes

of the WB-5 language, contemplates a change in ownership by way of an involuntary acquisition, such as condemnation.

A "transaction," as defined by WIS. ADMIN. CODE § RL 24.02(18) (Jan. 2001), requires a "sale, exchange, purchase or rental of, or the granting or acceptance of an option to sell, exchange, purchase or rent, an interest in real estate, a business or a business opportunity." Sonday insists that the term "transaction," as defined in the administrative code, "strongly connotes the *voluntary* conveyance or acquisition of some interest in real estate."

By contrast, the exercise of eminent domain by a governmental agency is "the power of the sovereign to take property for public use without the owner's consent upon making just compensation." ***Stelpflug v. Town Bd., Town of Waukesha***, 2000 WI 81, ¶19, 236 Wis. 2d 275, 612 N.W.2d 700 (quoting 1 NICHOLS, EMINENT DOMAIN § 1.11, at 1-10 (3d ed. 1999)). A condemnation sale price has been held inadmissible to show fair market value of other land because the price "is not determined by an arms-length transaction, but rather by dealings between one who must buy and another who has no choice but to sell." ***Kirkpatrick v. State***, 53 Wis. 2d 522, 526, 192 N.W.2d 856 (1972). It has been long settled, therefore, that a condemnation sale is not an arm's-length transaction.

The question then becomes whether the commission clause in the WB-5 contract contemplates transactions that are not at arm's-length. Contracts are construed to achieve the parties' intent. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. The terms used in a contract are to be given their plain and ordinary meaning. ***Id.*** The analysis ends if the words convey a clear and unambiguous meaning. ***Id.***

In the WB-5 contract, the term "transaction" is unrestricted and can be construed broadly to mean an act or instance of conducting business, something performed or carried out, or any activity involving two or more persons. *See* BLACK'S LAW DICTIONARY 1535 (8th ed. 2004). Here, the circuit court read the term broadly and implicitly held that the phrase "a transaction … which causes an effective change in ownership" includes conveyances other than voluntary, arm's-length transactions.

Kohel contends that the new WB-5 language fills a gap left by other commission-triggering terms. A commission is due if the seller sells, grants an option, or exchanges all or any part of the property during the term of the listing contract. Further, a commission is due, regardless of whether the sale closes, if the seller, broker or a third party procures an offer that meets the price and terms of the listing contract. The new language of the contract requires neither participation by the broker nor the seller for a commission to be due if "a transaction occurs which causes an effective change in ownership." Kohel asserts that the listing contract should not be read to omit a condemnation sale because "[a] proposed contractual interpretation that would read out of a contract language obviously important to one of the parties faces and ought to face a distinctly uphill struggle …." *See* ***Kazmierczak v. Swanson***, 24 F.3d 1020, 1022 (7th Cir. 1994) (applying Wisconsin law).

Discharge by Supervening Frustration of Purpose

Sonday also presents a contract defense based on supervening frustration of purpose. In ***Wm. Beaudoin & Sons, Inc. v. Milwaukee County***, 63 Wis. 2d 441, 448, 217 N.W.2d 373 (1974), the following definition of discharge by supervening frustration was adopted:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. (Citation omitted.)

Referencing ***Beaudoin***, the supreme court subsequently set forth the following factors required for a contract defense based on frustration: (1) the party's principal purposes in making the contract are frustrated; (2) without that party's fault; (3) by the occurrence of an event, the nonoccurrence of which was a basic assumption on which the contract was made. ***Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Chicago & N. W. Transp. Co.***, 82 Wis. 2d 514, 523-24, 263 N.W.2d 189 (1978).

Here, Sonday argues that the purpose of the WB-5 contract was to secure Kohel's brokerage services to procure a ready, willing, and able purchaser at the property's listing price of approximately $3,050,000. Sonday contends that the CDA's subsequent actions, culminating in the condemnation of the property, rendered Kohel's services worthless and frustrated the purpose of the listing contract.

Kohel emphasizes that the defense of frustration of purpose is not available unless the contract was based on the assumption that the supervening event would not take place. Kohel argues that "[i]f the contract covers the *possibility* of such an occurrence, the defense is not available." The WB-5 listing contract, at line fifty-two, covers the possibility that a transaction might occur through no direct action of the broker or the seller but, nevertheless, results in the change of ownership or control of all or part of the property. Thus, Kohel's

argument goes, no frustration occurs because the supervening event is contemplated in the language of the contract.

Because the facts of ***Beaudoin*** and ***Chicago*** are distinguishable from those here, this case presents the supreme court with an opportunity to address the doctrine of supervening frustration of purpose in the context of real estate listing contracts for property involuntarily transferred by condemnation during the term of the contract.

Public Policy Considerations

The general rule is that parties are free to contract as they see fit; however, contracts that impose obligations that are contrary to public policy are unenforceable. ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 710-11, 456 N.W.2d 359 (1990). Public policy is that principle of law under which "freedom of contract is restricted by law for the good of the community." ***Richards v. Richards***, 181 Wis. 2d 1007, 1015, 513 N.W.2d 118 (1994) (citation omitted). Generally, people should be allowed to manage their affairs without government interference. ***Id.*** at 1016. The freedom to contract is based on a bargain freely and voluntarily made through a bargaining process that has integrity.[4] ***Id.***

[4] Here, neither party disputes that the listing contract was freely and voluntarily made; however, the transaction that triggered a broker's commission under the contract was not voluntary.

Most Wisconsin cases that present public policy analyses in contract law address exculpatory clauses.[5] Although not the issue here, such analyses may shed light on the proper approach to the broker's commission clause. For example, to pass public policy muster, an exculpatory clause must "clearly, unambiguously, and unmistakably inform the signer of what is being waived" and must, when looked at in its entirety, "alert the signer to the nature and significance of what is being signed." ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 84, 557 N.W.2d 60 (1996) (holding that a ski ticket releasing the ski hill operator from liability was against public policy). In ***Richards***, a slightly different analysis was employed to assess whether exculpatory language was contrary to public policy. There, the clause was held unenforceable for three reasons: (1) the contract served two purposes, neither of which was clearly identified or distinguished; (2) the release was broad and all-inclusive; and (3) there was little or no opportunity to negotiate over the contract language. ***Richards***, 181 Wis. 2d at 1011 (holding that a trucking company's "Passenger Authorization," which served as a waiver of liability, was against public policy).

Even though exculpatory clauses have received much public policy scrutiny, the analyses are not always consistent. In ***Atkins v. Swimwest Family Fitness Center***, 2005 WI 4, ¶18 n.7, 277 Wis. 2d 303, 691 N.W.2d 334, the court acknowledged that:

> [***Yauger*** and ***Richards***] place different weight on the public policy factors used to invalidate exculpatory clauses. In ***Yauger***, for example, "the presence of a single

[5] *See, e.g.*, ***College Mobile Home Park & Sales, Inc. v. Hoffmann***, 72 Wis. 2d 514, 521-22, 241 N.W.2d 174 (1976); ***Dobratz v. Thomson***, 161 Wis. 2d 502, 514, 468 N.W.2d 654 (1991); ***Atkins v. Swimwest Family Fitness Ctr.***, 2005 WI 4, ¶13, 277 Wis. 2d 303, 691 N.W.2d 334.

> objectionable characteristic (was) sufficient to justify invalidating an exculpatory agreement." On the other hand, in ***Richards***, the court stated that "none of these factors alone would necessarily have warranted invalidation of the exculpatory contract." (Citations omitted.)

Furthermore, cases from other jurisdictions offer little guidance with regard to the precise language of the WB-5 listing contract; however, they do offer insight into underlying policies. For example, in ***Wilson v. Frederick R. Ross Investment Co.***, 180 P.2d 226, 231-32 (Colo. 1947), the court considered whether an involuntary taking by condemnation was a sale, ultimately denying the broker's commission and observing:

> In the usual bargaining between seller and purchaser, the seller is in a position where he does not have to convey if the purchaser does not meet his terms; in a condemnation proceeding, the owner has lost the power to withhold the property or any portion of it; his field of negotiation is narrowed down to the two choices, (1) reaching an accord in respect to compensation for the property condemned, or (2) contesting the case in court…. We have found no case that would suggest recovery of a commission under the facts of the instant case.

The Kings County, New York Supreme Court relied on the ***Wilson*** rationale to conclude that "[i]n the absence of a specific provision in a broker's contract to the contrary, disposition of the title to real estate through condemnation proceedings does not constitute a sale, transfer or assignment." ***Shaw v. Avenue D Stores, Inc.***, 115 N.Y.S.2d 194, 197 (1952). This theme echoes in ***Lundstrom, Inc. v. Nikkei Concerns, Inc.***, 758 P.2d 561, 564 (Wash. Ct. App. 1988), where the court held that when a governmental agency exercises its eminent domain power, by condemnation or negotiated agreement, the transfer is not a sale entitling the broker to a commission "unless the agreement specifies otherwise or clearly contemplates a sale to the agency." The court observed that the listing

contract before it included no reference to "eminent domain, condemnation, a taking, or a sale to any governmental agency." ***Id.***

This line of cases presents two underlying principles: (1) a transfer of property by condemnation does not constitute a sale; and (2) a real estate broker can remedy the problem by specifically referencing condemnation, eminent domain, or governmental taking in the commission clause of the listing contract. Nonetheless, these cases predate the recent revisions to the WB-5 contract and construe language that is different from that presented here.

No case law exists that construes the precise language of the new standard WB-5 commercial listing contract or the public policy implications of requiring a broker's commission when a property is condemned during the term of a listing contract.

CONCLUSION

This is a matter of first impression in Wisconsin. It presents far-reaching implications for sellers and brokers entering into real estate listing contracts. Furthermore, it invites a public policy analysis balancing the freedom to contract as restricted by law for the good of the community. Therefore, we respectfully certify the issues to the Wisconsin Supreme Court.